IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. _____

CONTINENTAL MARKETING CORPORATION,

Petitioner,

vs.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Petitioner, CONTINENTAL MARKETING CORPORATION, was a corporation engaged in the business of selling live identified beaver animals on a brokerage basis, and was enjoined

(along with nine co-defendants) by the District Court of the District of Utah from offering for sale or selling beaver animals in violation of the anti fraud provisions contained in Section 17(a), of the Securities Act of 1933, as Amended; 15 U.S.C. 77q(a), Section 10(b), of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5 under a finding that the animals were "investment contracts" and, therefore, "securities", as defined by the Securities Acts and judicial interpretation thereof.

The Supreme Court of the United States has jurisdiction upon appeal to review a judgment of the United States Court of Appeals, as provided in 28 U.S.C.A. Section 1254(1).

The sole question presented is whether the sale of identified personal property without the accompaniment, offer, or even the capability of the seller to furnish a contract or agreement for the care, management, or service of the property constitutes the sale of a "security", as defined by the Securities Act of 1933, and the Securities Exchange Act of 1934.

No decision can be found holding that the sale of personal property without the accompaniment or offer of a contract or agreement for service, retention, or management of the property by the seller or a third person owned or controlled by the seller, constitutes the sale of a "security". Courts have found, however, that the sale of personal property not coupled with a management or service contract, but advising

the purchaser from whom such a service or management contract could be obtained was not the sale of a "security" or investment contract. It is submitted that this case represents a clear departure from the law as it existed in holding the sale of personal property separate and apart from, and without any offer of, any management or service agreement or contract to constitute the sale of an "investment contract", and, therefore, a security.

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

This supporting brief is presented in connection with the Petition for Certiorari, as provided in Rule 38(2), of the Rules of the Supreme Court.

This case was largely influenced in its decision by both the District Court for the District of Utah and the United States Court of Appeals for the Tenth Circuit by the language of the Supreme Court of the United States contained in the Opinion rendered in the matter of Securities and Exchange Commission v. W. J. Howey Co. (1946), 328 U.S. 293, at 301:

"The test is whether the scheme involves

an investment of money in a common enterprises with profits to come solely from the efforts of others."

The facts in Howey were that investors were offered parcels of real property with growing orange trees in combination with service contracts with the company owned by Howey called Howey-in-the Hills Service, Inc., and the arrangement was properly held to constitute an "investment contract". However, because W. J. Howey Co. offered the property in conjunction with a service contract to be performed by a separate corporation largely owned by Howey, the quoted language above was not necessary to a decision of the case, and the quoted language was not used to define the concept of an "investment contract" but was contained in a paragraph rejecting the suggestion of the Circuit Court of Appeals that an investment contract is missing where the enterprise is not speculative or promotional in character.

Roe v. United States (1961), 287 F. 2d 435, was also persuasive in the decision of this case. The Court of Appeals was impressed by the language on Page 439, as follows:

"The promoters were selling a chance to make a great deal of money from activities which were then, or would shortly be, carried on by persons other than the purchasers. In that setting it mattered not whether the test wells were to be drilled by sellers, or by third persons either under or independent of their

control."

However, the facts in Roe v. United States were that fractional oil interests were being sold coupled with promises of a proposed test well to be drilled upon the property by the seller and the location of additional deposits by the seller by a method used and perfected by the seller. Therefore, here again, the quoted language was unnecessary to the decision, and, as a matter of fact, the court took the pains to point out the fact that the drilling of the well was controlled by, and was a promise made by and contemplated to be performed by the seller in the following language, at Page 439:

> "In addition, considering that Roe was the president and dominating character of Stratoray through whom Stratoray alone acted for much of the period involved, this record warrants a holding that each had, directly or indirectly, made substantial contributions toward the test wells. In the Texas area, it was a contribution of a section of leases to the driller of the well. In Utah, it was the substantial payment of cash through the instrument of another corporation dominated and later wholly-owned by Roe. More than that, the sales letters openly boasted that the locations of the test wells had been fixed by Roe through the use of his 'gamma ray scintillator unit' . . . . ."

In Union Land Associates v. Ussher (1944),

174 Oregon 453, 149 P. 2d 568, the Supreme Court of Oregon reviewed the sale of oyster beds by a seller who did not offer a service contract for the harvesting of the oysters, but under circumstances where the seller advised the purchaser where the services could be obtained from two firms engaged in the harvesting of the oysters. The opinion of the Supreme Court states in part, on Page 458:

> "In the instant case, there is no sale of any security or 'investment contract' within the meaning of the act. There is no obligation on the part of plaintiff's vendors to do anything under the contract other than deliver the deed upon the payment of the purchase price. Neither was the contract of purchase connected with any promotion scheme involving the sharing of expected profits to be made through the efforts of the seller."

Regardless of the language quoted above, the facts of the cases reviewed, and many other cases not included in this brief, demonstrate that the courts have found an investment contract to be present only when the seller sold property coupled with, or offering, a service or management contract or agreement to be

performed by the seller, his agent, or by a corporation owned or controlled by the seller.

Respectfully submitted,

LEWIS B. KEAN
EARL HIGHTOWER
H. BYRON MOCK

By: LEWIS B. KEAN

Attorneys for Petitioner,
Continental Marketing
Corporation.

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term 1967

No. 1 2 5 8

CONTINENTAL MARKETING CORPORATION,

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vs.

SECURITIES AND EXCHANGE COMMISSION,

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

Before: The Honorable A. Sherman Christensen,
United States District Judge.

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, -v- NORTH AMERICAN BEAVER ASSOCIATION, et al., Defendants.	No. C 172-66 REPORTER'S TRANSCRIPT OF ORAL OPINION OF THE COURT ON PRELIMINARY INJUNCTION AND CERTAIN MOTIONS

September 29, 1966
Salt Lake City, Utah

APPEARANCES:

For plaintiff:	JOSEPH F. KRYS ROBERT H. DAVENPORT G. GAIL WEGGELAND
For N. American Beaver Assn. and Beaver Ranchers' Assn.:	ARTHUR H. NIELSEN DEAN E. CONDER
For International Marketing, American-Canadian Beaver Co., and the Weavers:	EVERETT E. DAHL

For Weavers' Beaver Associated Ranchers:	DELBERT M. DRAPER HOMER M. JENSEN DAVID S. GELDZAHLER
For Continental Marketing:	LEWIS B. KEAN EARL HIGHTOWER H. BYRON MOCK
For Beaver Sales:	WALLACE R. BENNETT

Thursday, September 29, 1966.

THE COURT: First, on the motions to dismiss for lack of subject matter jurisdiction, for lack of personal jurisdiction, the Court finds from a preponderance of the evidence that there is a securities transaction involved; to wit, an investment contract.

I think the reasons for so finding are implicit in the discussion, and I won't take the time further to explore them. Accordingly, the Court finds that there is both subject matter jurisdiction and jurisdiction over the person.

As pointed out in Securities and Exchange Commission v. Joiner Leasing Corporation, such a determination may be based as a controlling factual determination in these cases upon a preponderance of the evidence. The evidence at this time preponderates in favor of that determination, I believe.

It is a moot inquiry, I suppose, to consider whether, apart from such preponderant proof, at this stage jurisdiction would otherwise appear from a colorable or arguable showing.

The next problem, of course, is whether a preliminary injunction should be granted, considering the general criteria for that determination, but with particular reference to the circumstances shown in evidence before the Court at this time.

I can't rule out consideration of the probability or lack of probability of the ultimate success of the Commission with reference to a permanent injunction. I feel confident in my own mind upon the present showing that the evidence clearly preponderates to show that this is an investment contract in the general context of the sales and the policy of sales of the beaver and the related representations as to services and handling.

The subject certainly isn't free from doubt, and the Court doesn't consider itself infallible; indeed, has received constant proof over the years that it isn't. All we can do is decide matters before us based upon present judgment.

I think it probable that as far as--strike that.

I don't think it desirable or essential to project further the probability of particular results; but there being some substantial

questions involved which can be clarified or resolved by proof on the merits, I can't ignore the balancing of equities, assuming on the one hand the ultimate determination in favor of the Commission and on the other hand the ultimate determination in favor of the defendants.

I'm convinced that it is the Court's duty, having arrived at a judgment that this is an investment contract, thus within not only the Court's jurisdiction, but the Court's power to act with reference to it in this particular type of case, that a preliminary injunction should be granted.

The content and substance of that preliminary injunction must at least--that I'm convinced of without any question--preclude continued sale of the investment contracts involving the sale, care, management, replacement, and resale of live beaver for breeding purposes by the defendants by use of the mails or any other means or instruments of transportation or communication in interstate commerce, or any instrumentality in interstate commerce directly or indirectly by means of any device, scheme, or artifice to defraud, to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit or obtaining money or property by means of untrue statements of material facts or omissions to state material facts necessary to be stated in order to make the statements made in the light of the circumstances under which they were made not misleading concerning at least a substantial part of the subject matters set out

in the prayer of the Commission's complaint.

I think that as a matter of draftsmanship, the language could be improved on the basis of the evidence, without resort to the vague language of the statute itself; and I think that a specification of the subject matters could be unified and improved, because we're getting down into minutia which might be misleading with regard to effectuating sales; and I'm thinking particularly of sales that might be accomplished by others, but perhaps with advice or assistance of personnel which technically could amount to a violation punishable by contempt if the definition is impractical. But I ask that the draftsman give consideration to a little more practical definition of the subject matter of any misrepresentations or failure to disclose.

I don't propose, until the Court otherwise orders, to have any of the defendants making sales to other people based upon failure to fairly and adequately disclose the facts or the substance of facts which are undisputed here in the record and cannot be disputed, to the extent that they are reasonably necessary in order to render statements made not misleading.

The question of whether any and all sales by any and all defendants should be also enjoined by a preliminary injunction I haven't resolved fully in my own mind.

The Commission may submit alternate forms of orders based upon a distinction and findings as between--on the balance of equity,

so I can consider both, together with a memorandum in support of either form, if it desires to do so.

If counsel for the defendants have any objection as to form with reference to the type of injunction which I am convinced must be as a minimum entered here, I would request that they be called to my attention within two days, in accordance with my general rule. Forty-eight hours. I hold proposed findings and conclusions and orders for that length of time awaiting any possible objections. If there is any objection to the substance or form of order going beyond enjoining of sales accomplished by misrepresentation, I'll be glad to have those in writing also, if filed within that time. Either side may submit brief memoranda in support of proposed findings, or objections.

I don't anticipate any further hearing. I will consider the documents submitted and come to a judgment on the preliminary injunction. I really anticipate that in line with my view of the case requiring a fair disclosure in connection with any sales that the more limited injunction may have the practical effect of foreclosing any and all sales by the sales agencies, but I don't know. I think that any sales accomplished would have to be under most circumspect conditions, and I think that the results under a limited injunction may be very revealing with regard to the final hearing, because if there is an overreaching of a limited preliminary injunction, that will throw great light upon the necessity of very complete and stringent requirements

in any final injunction. That, again, might be moot, because any final injunction, if one is granted, will be a complete prohibition of sales until registration is accomplished, if at all; and that would have to be in that form, I assume.

When will you gentlemen be ready to try the case as far as the Commission is concerned?

MR. DAVENPORT: Your Honor, we'd like to have, with the Court's permission, about 90 days at least in order to take these depositions from people all over the United States, as we indicated earlier, since they are outside the jurisdiction of the Court.

THE COURT: When do the defendants anticipate they will be ready to try the case?

MR. NIELSEN: Your Honor, I'm going to be engaged shortly in the trial of an antitrust case in the other arm of this court, and I am in the process of final preparation; and it would take, I think, even more than that to properly prepare, although I'll abide by the Court's determination of it. I was thinking in terms of the latter part of February. This other trial has been set for January 30.

THE COURT: I see. Mr. Dahl.

MR. DAHL: Because of the import of the preliminary injunction, I urge that the matter be tried as quickly as possible; and we would be ready to try it almost any time.

THE COURT: Would you be willing to submit it upon the present record? Have you completed your discovery or--

MR. DAHL: No. We would not submit it on the present record, your Honor, no.

THE COURT: Do you have some discovery to make?

MR. DAHL: Yes, there will be some discovery, but we have been making discovery going along.

THE COURT: I see. Professor Bennett, have you come to a judgment as to it?

MR. BENNETT: No, but I would think the 90-day period would be adequate.

THE COURT: Our calendar situation may clarify within a short time. In any event, as soon as the case is at issue, suppose we set it down in due course? That is, within 30 to 60 days after issue, for pretrial conference, in which event we can determine the time of trial.

MR. DAHL: I have one question on the injunction. Does this also go--does this injunction go against all of the defendants? We have have some personal individuals also named.

THE COURT: Yes. It would certainly go against them, if it's the limited injunction that I anticipate--or, that I'm sure should be entered, at least, which is to preclude sales by

means of misrepresentations pursuant to any scheme. And if it's the more general injunction, you raise the question on any response to the Government's proposal, and I'll consider it.

If there is nothing further to come before the Court, we'll stand in recess.

Certification illegible - Dated the 30th day of September, 1966 at Salt Lake City, Utah.
Signed: Ronald F. Hubbard.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CIVIL ACTION File No. C-172-66

Filed in United States District Court, District of Utah

Time: OCT 12 1966

Andrew John Brennan, Clerk

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, v. NORTH AMERICAN BEAVER ASSOCIATION (formerly Weavers' Beaver Association), et al., Defendants.	FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF PRELIMINARY INJUNCTION

The plaintiff's motion of Preliminary Injunction against the defendants coming on to be heard by the Court on September 19, 1966, and after argument being continued to September 28, 1966, for the taking of evidence and to September 29, 1966, for additional argument and

Joseph F. Krys, Robert H. Davenport and G. Gail Weggeland appearing as counsel for the plaintiff and Arthur H. Nielsen and Dean E. Conder appearing as counsel for the defendants North American Beaver Association and Beaver Ranchers Association; Everett E. Dahl appearing as counsel for the defendants International Marketing Corporation, American-Canadian Beaver Company, Inc.; Mark L. Weaver, Van R. Weaver and Ted L. Weaver, Delbert M. Draper, Homer M. Jensen and David S. Geldzahler appearing as counsel for the defendant Weavers' Beaver Associated Ranchers; Louis B. Kean, Earl Hightower and H. Byron Mock appearing as counsel for the defendant Continental Marketing Corporation; and Wallace R. Bennett, appearing as counsel for the defendant Beaver Sales, Inc., and evidence by affidavits, transcripts of interrogation, other documents and witnesses having been introduced and said cause having been duly submitted for decision and the Court having considered the evidence and the law applicable thereto, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Since on or about January 1957 and prior thereto, the defendants have been and are now offering for sale and selling securities, to wit, investment contracts, that is, contracts involving the sale, care, management, replacement, feeding and resale of live beaver for investment, to investors. Purchasers residing in at least 34 states, Canada and overseas have invested in excess of $7,000,000.00 in such contracts.

2. The defendants have been offering for sale and selling live beaver and have been representing to the prospective purchasers and purchasers that there are available services for the ranching, care, feeding, veterinary and dental care, sexing, mating, record keeping, transportation, genetics, replacement and resale of the beaver offered and sold and their offspring.

3. The representations made in the sale of the beaver render the transactions as securities transactions.

4. For more than one year last past the beaver have been so offered for sale and sold by the defendants International Marketing Corporation, Beaver Sales, Inc. and Continental Marketing Corporation, for the ranchers, other defendants and others, and there are no other organizations presently offering for sale to the public live beaver for breeding purposes.

5. For some time prior thereto the beaver were so sold by the defendants North American Beaver Association, American-Canadian Beaver Company, Inc., Mark L. Weaver, Van R. Weaver and Ted L. Weaver. For more than one year last past the last-mentioned defendants have sold beaver with such representations through the defendants International Marketing Corporation, Beaver Sales, Inc., and Continental Marketing Corporation.

6. The defendants North American Beaver Association and American-Canadian Beaver Company, Inc. offer for sale and sell services

to purchasers of the beaver sold through Beaver Sales, Inc., International Marketing Corporation and Continental Marketing Corporation.

7. For more than one year last past the defendants North American Beaver Association, American-Canadian Beaver Company, Inc., Beaver Ranchers Association and Weavers' Beaver Associated Ranchers have been collecting ranching fees from purchasers of the beaver and distributing the proceeds among ranchers after deducting charges for services consisting of administration, record keeping, consultation services, feeding, medical care, housing, sexing, mating, transportation and genetical services.

8. The defendants Beaver Ranchers Association, a corporation, and Weavers' Beaver Associated Ranchers, an association, are organizations of ranchers who provide ranching services for purchasers of beaver and the additional services mentioned above, directly and indirectly, including record keeping, administration consultation services, feeding, medical care, housing, sexing, mating, transportation and genetical services. With few exceptions, beaver ranchers are members of either one or the other of these defendant organizations.

9. Numerous purchasers of the beaver look to the efforts of the defendants in order to earn profits as a result of the purchase of beaver and are dependent on the efforts of the defendants to care for, service and resell their beaver and the offspring of their beaver.

10. Investors offering beaver for sale through the defendants are charged sales commissions ranging between 35% and 40% of the sale price.

11. The defendants have been and are offering securities for sale.

12. No registration statement has been filed or is in effect with the Securities and Exchange Commission under the Securities Act of 1933, as amended, with respect to any beaver offered for sale and sold by means of representations that there are available services for the care, maintenance, replacement, ranching, veterinary and dental care, sexing, mating, record keeping, transportation and genetics, replacement and resale of beaver.

13. The defendants have been making use of the mails and means and instruments of transportation and communication in interstate commerce to offer for sale and to sell and deliver such securities, to wit, investment contracts involving the sale, care, management, replacement and resale of live beaver for breeding purposes.

14. In the sale of the said securities the defendants and each of them have been and are obtaining property and money by means of untrue statements of material facts made to purchasers and prospective purchasers as follows:

a. There is a market for live beaver at prices ranging between $2,000

and $6,000 per pair.

b. There is a large market demand for beaver pelts at prices ranging between $100 and $800 per pelt.

c. The purchasers of beaver at the prices offered for sale by the defendants will be able to resell their beaver with ease at such prices.

d. The purchasers of beaver will be able to earn large profits from their investment in beaver by reselling the beaver purchased and their offspring in the immediate future and ultimately by selling beaver pelts.

e. The domestic herd consists of the offspring of the original herd of 60 pair of beaver originally acquired by Mark L. Weaver in 1950.

f. Beaver supplied as replacements under warranties are pen-born domestic beaver of like value as those sold to the purchasers.

g. Beaver are sold by the defendants in the order in which they are listed with the defendants for sale.

h. Mark Weaver was the first man in the world to learn the secret of the

beaver, the mating process, the pen design and other factors necessary to induce the beaver to reproduce successfully in captivity, and that Mark Weaver alone had been successful in the raising of beaver.

i. The defendants were the only ones who could determine the sex of a beaver.

j. The beaver will be sold in the order in which they are listed for sale with one or more of the defendants.

k. Numerous persons unassociated with the defendants have made money from an investment in beaver.

l. Representative purchasers of live beaver have reaped large profits from the sale of live beaver.

15. In connection with the statements made to sell the beaver along with the representations as to the service available for their care, maintenance, ranching, feeding, veterinary and dental care, sexing, mating, record keeping, transportation and genetics, replacement and resale, the statements that the defendants are making as enumerated above and others are misleading by reason of the omission to disclose the following:

a. There is no market for live beaver except that created and maintained by the defendants, and extensive sales effort is needed to sell live beaver at prices ranging between $1,000 and $3,000 each.

b. Each of the defendants which is now selling beaver has more beaver to sell than purchasers are willing to buy at the prices at which the beaver are offered for sale. The defendants have been and are unable to sell substantial numbers of beaver which have been listed with the selling organizations for periods ranging up to five years.

c. Certain purchasers of beaver from the defendants have had to sell their beaver and have sustained substantial losses.

d. The defendants have been selling beaver owned by the defendants in preference to those owned by members of the public.

e. The defendants refuse to accept for listing all beaver offered for sale.

f. The defendants have been charging prices ranging between $1,000 and $3,000 for each beaver offered and sold, but the defendants have purchased trapped wild beaver to

replace those sold if the sold beavers should die or turn out to be non-producers at prices ranging between $20 and $100 per beaver.

g. The defendants have been using trapped wild beaver as replacement beaver, notwithstanding that they have been representing that pen-born domesticated beaver are more valuable and that the beaver sold would be replaced with beaver of like quality or value.

h. In February and March of 1966, beaver pelt prices averaged approximately $12.52 per pelt and that in May and April of 1966, $15 per pelt and since 1932 to date, the highest average price at which a lot of beaver pelts had sold was $70 per pelt and generally $20 to $40 per pelt, and as low as $6.15 per pelt, notwithstanding the defendants have been representing that ranching fees are $72 per year for each beaver and that it takes more than a year for a beaver to reach maturity and that the purchaser will profit from investing in beaver at prices of $2,000 to $6,000 per pair.

i. The prices charged to the public for beaver and for ranching

services are incongruous in relation to pelt prices.

j. The prices charged for beaver are even more incongruous when it is considered that by nature beaver are monogamous; thus it cannot be expected that stud fees could be obtained for stud services of male beaver.

k. Beaver reproduce slowly and generally have only one litter per year. The average litter consists of three to four kits, but less than 50% of the female beaver produce kits each year.

l. Purchasers of beaver who might wish to resell in the near future will of necessity lose substantial portions of their respective investments.

m. The transactions effected by the defendants probably are violative of the registration and other requirements imposed by the federal securities laws.

n. Over 11,000 trapped wild beaver have been introduced into the so-called domestic herd subsequent to 1950, in connection with representations that the domestic herd is the offspring of 60 pairs of wild beaver

imported from Canada in 1950.

16. The matters which the defendants have been omitting to disclose are material facts necessary to be stated in order to make the statements made in the light of the circumstances under which they were made not misleading.

17. Unless unforseen and unforeseeable things happen, it does not seem probable that an investment in beaver will prove economically profitable.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of this suit.

2. There are no exemptions from the anti-fraud provisions of the Securities Act of 1933, as amended.

3. The representations, statements and omissions to state material facts in connection with the sale of securities, to wit, investment contracts, as described above, by use of the mails and means and instruments of transportation and communication in interstate commerce are in violation of Section 17(a) of the Securities Act of 1933, as amended, and 15 U.S.C. 77q(a) and Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78j(b) and Rule 17 C.F.R. 240.10b-5 adopted thereunder by the Securities and Exchange Commission.

4. The defendants have the burden of proof to establish that an exemption from the registration provisions of the Securities Act of 1933, as amended, is available. They have not carried that burden.

5. The use being made by the defendants of the mails and the means and instruments of transportation and communication in interstate commerce to offer for sale and to sell beaver by representations making them securities, to wit, investment contracts, without a registration statement relating to such securities having been filed or in effect under the Securities Act of 1933, as amended, is violative of Sections 5(a) and 5(c) of the Securities Act of 1933, as amended, 15 U.S.C. 77e(a) and (c).

6. The defendants are presently engaged in the acts and practices specified hereinabove and thus the plaintiff is entitled to a preliminary injunction restraining the defendants from further violating the aforesaid provisions of law.

7. In balancing the equities of beaver owners and possible future purchasers of beaver under circumstances that the transactions involve investment contracts, the Court concludes that it would be equitable not to grant preliminary injunction relief insofar as the activity is violative of Sections 5(a) and 5(c) of the Securities Act of 1933, as amended, but concludes that it would be equitable and is necessary in order to protect the public interest and possible future purchasers of such investment contracts that a preliminary injunction be entered enjoining

the defendants from violating the antifraud provisions of the federal securities laws, to which citations have been made hereinabove.

8. In order to effect this necessary protection for prospective future purchasers, it is necessary and appropriate that the decree to be entered enjoining conduct violative of the antifraud provisions contain provisions requiring the defendants when selling beaver with representations that various care and service arrangements are available to make certain affirmative disclosures in writing to such prospective purchasers before such purchasers become committed to buy such beaver offered or sold or before they pay any part of the purchase price, whichever occurs first, all as stated in the preliminary injunction entered herein.

9. The defendants should be preliminarily enjoined from making any representations as to the following unless clearly qualified as being speculative and as conditioned by other representations herein required, or any false representations concerning whatsoever as to:

a. The profits that a purchaser might obtain if he bought beaver;

b. The future price of beaver for breeding or other purposes;

c. The prices the beaver pelts will bring in the future;

d. A difference in quality between the

price of pelts taken from wild beaver and the pelts taken from domesticated beaver;

e. Any difference in market prices for pelts taken from wild beaver and pelts taken from domesticated beaver;

f. The profits made by other owners of beaver; or

g. Any other future event or happening.

10. The decree should also contain provisions prohibiting the defendants from making false statements, all as specified in the Preliminary Injunction.

11. The motion of the defendants to dismiss this action should be denied.

12. In making these Findings of Fact and Conclusions of Law based thereon, I expressly find and hold that these Findings shall not be binding on the Court when a full trial is had on the merits of the action and after all issues are made up and all parties are given full opportunity to submit all of their evidence.

Dated this 10th day of Oct., 1966.

BY THE COURT

/s/ A. Sherman Christensen

A. Sherman Christensen
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CIVIL ACTION File No. C 172-66

Filed in United States District Court, District of Utah

Time: OCT 12 1966

Andrew John Brennan, Clerk

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

v.

NORTH AMERICAN BEAVER ASSOCIATION, (Formerly WEAVERS' BEAVER ASSOCIATION) BEAVER SALES, INC., BEAVER RANCHERS ASSOCIATION, AMERICAN-CANADIAN BEAVER COMPANY, INC., INTERNATIONAL MARKETING CORPORATION, WEAVERS' BEAVER ASSOCIATED RANCHERS, CONTINENTAL MARKETING CORPORATION, MARK L. WEAVER, VAN R. WEAVER and TED L. WEAVER

Defendants.

PRELIMINARY INJUNCTION

The above entitled cause coming on regularly for hearing by the Court on the plaintiff's motion for a preliminary injunction on September 19, 1966, and after argument being continued to September 28, 1966, for the taking of evidence and to September 29, 1966, for additional argument, and Joseph F. Krys, Robert H. Davenport and G. Gail Weggeland appearing as counsel for plaintiff, and Arthur H. Nielsen, Dean E. Conder appearing as counsel for the defendants North American Beaver Association and Beaver Ranchers Association; Everett E. Dahl appearing as counsel for the defendants International Marketing Corporation, American-Canadian Beaver Company, Inc., Mark L. Weaver, Van R. Weaver and Ted L. Weaver; Delbert M. Draper, Homer M. Jensen and David S. Geldzahler appearing as counsel for the defendant Weavers' Beaver Associated Ranchers; Louis B. Kean, Earl Hightower and H. Byron Mock appearing as counsel for the defendant Continental Marketing Corporation; and Wallace R. Bennett appearing as counsel for the defendant Beaver Sales, Inc.; and evidence by affidavits, transcripts of interrogation, other documents and witnesses having been introduced and said cause having been duly submitted for decision; and the Court having considered the evidence and the law applicable thereto; and the Court having this date made, entered and filed herein its Findings of Fact and Conclusions of Law; in accordance with said Findings of Fact and Conclusions of Law:

IT IS ORDERED, ADJUDGED AND DECREED that the defendants, North American

Beaver Association, Beaver Sales, Inc., Beaver Ranchers Association, American-Canadian Beaver Company, Inc., International Marketing Corporation, Weavers' Beaver Associated Ranchers, Continental Marketing Corporation, Mark L. Weaver, Van R. Weaver and Ted L. Weaver, and their directors, officers, agents, employees, attorneys, and those persons in active concert or participation with the aforesaid persons who receive actual notice of this preliminary injunction, and each of them be and hereby are enjoined pending the final determination of this action from:

In the sale of securities, to wit, investment contracts involving the sale, care, management, replacement or resale of live beaver for breeding purposes, by use of the mails, or any means or instruments of transportation or communication in interstate commerce, or any instrumentality in interstate commerce, directly or indirectly: Engaging in any device, scheme, or artifice to defraud, engaging in any transaction, practice or course of business which operates or would operate as a fraud or deceit, or obtaining money or property by means of untrue statements of material facts or omissions to state material facts necessary to be stated in order to make the statements made, in light of the circumstances under which they were made, not misleading.

More specifically in the sale of beaver with representations that arrangements can be made for their ranching, care, management, replacement, breeding or resale, the defendants shall

inform each and every offeree of the beaver as follows:

1. There is pending in the United States District Court for the District of Utah, an action brought by the Securities and Exchange Commission against the aforementioned enjoined persons alleging that the sale of beaver with representations that services, or some of them, are available for the care, management, replacement and resale of live beaver for breeding purposes, constitutes the offer and/or sale of securities, to wit, investment contracts.

2. The offer for sale of securities by use of mails or any means or instruments of transportation or communication in interstate commerce is prohibited by law unless a registration statement relating to said securities has been filed with the Securities and Exchange Commission and the sale and delivery of such securities by such means is prohibited unless a registration statement relating to such securities is effective.

3. No registration statement has been filed, nor is in effect with the Securities and Exchange Commission with respect to the securities offered for sale and sold by the persons enjoined.

4. If the securities are registered with

the Commission pursuant to the Securities Act of 1933, as amended, then such securities may be sold by such means; however, a propectus, a copy of which would have to be filed with the Commission containing detailed information about the securities, must be delivered to each and every offeree.

5. The Court has concluded for the purpose of the Motion For Preliminary Injunction that the offer and sale of beaver accompanied by such representations does involve the offer and sale of securities and has issued a preliminary injunction which requires, among other things, affirmative disclosure of certain facts. This conclusion is not binding on the Court when the case is tried on the merits. However, if after trial on the merits is held, the Court reaches the same conclusion, the defendants will, in all probability, be permanently enjoined from offering for sale such securities until a registration statement relating to such securities has been filed with the Commission and from selling or delivering such securities by use of the mails or means of instruments of transportation or communication in interstate commerce until a registration statement relating to such securities is effective.

6. If the defendants file a registration statement and it becomes effective,

they will have to make use of a prospectus to sell such securities by such means which will contain detailed information about the securities and the prospects of the venture.

7. The information that may be contained in the prospectus may be such that prospective purchasers may be unwilling to buy the beaver and, thus, purchasers of beaver in the intervening period may find it difficult if not impossible to sell their beaver at prices which may result in any profit in the forseeable future.

8. There is no market for live beaver at prices in excess of $100 per beaver, (live beaver can be purchased for as little as $20 each), except the market created and maintained by the defendants, and the failure of the defendants to create and maintain the market may result in the beaver owner being unable to sell the beaver except at nominal prices.

9. Only three organizations presently offer live beaver for sale to the public and each of them is a defendant in this action. They are International Marketing Corporation, Beaver Sales, Inc. and Continental Marketing Corporation. Each of these organizations charges a substantial commission for the sale of beaver, to wit, a commission ranging

between 35% and 40% of the sales price.

10. There is no spontaneous demand for live beaver. Live beaver presently can be sold only with extensive sales effort. It is thus probable that any purchaser of beaver who wishes to resell the same shortly after his purchase will of necessity lose a substantial portion of his investment.

11. The three selling organizations have been offering for sale and selling live beaver in the recent past at prices ranging between $2,400 and $6,000 per pair.

12. Many existing owners of beaver who purchased beaver from or through the said organizations or other of the defendants have been trying for considerable periods of time to sell their beaver, but the said selling organizations have been unsuccessful in selling substantial numbers of such beaver, and have preferred in various instances the sale of beaver owned by the defendants.

13. Certain purchasers of such beaver have had to sell their beaver and have sustained substantial losses as a result.

14. Though the selling organizations in the pending action have been offering beaver for prices ranging between

$1,000 and $3,000 for each beaver and the purchasers have obtained warranties to have those beaver replaced if they died or failed to reproduce, the defendants in the pending action, obligated under such warranties, have purchased beaver to effect such replacement at a price ranging between $20 and $100 for each beaver. In excess of 11,000 trapped wild beaver have been introduced into the so-called domestic herd for this purpose.

15. With few exceptions, persons who offer ranching services are members of organizations which are defendants in the pending action. Such ranchers charge ranching fees of up to $72 per year for each beaver.

16. In February and March of 1966, beaver pelt prices averaged $12.52 per pelt. In April and May of 1966, they averaged $14.88 per pelt. Since 1932 to date the highest average price at which a lot of beaver pelt has sold, according to the evidence before the Court, is $70 per pelt. Generally, over the last 30 years the price range has been between $20 and $40 per pelt and as low as $6.15 per pelt.

17. The prices charged for live beaver to the public and the ranching fees bear no reasonable relationship to pelt prices. By nature beaver are

monogamous and, thus, it cannot be reasonably expected that stud fees could be obtained for stud services of male beaver. Since beaver reproduce slowly in that they have only one litter per year and the average litter consists of three to four kits, and only about 50% of the female beaver in the herd produce kits in each year, unless unforseen things happen, it does not seem probable that an investment in beaver will prove economically profitable in the forseeable future.

In effecting sales of beaver the defendants shall fairly make each and every one of the aforesaid statements. Each of the aforesaid representations shall be made in writing to the prospect at least 24 hours before the purchaser commits himself to buy the beaver or pays any portion of the purchase price whichever first occurs. Such representations are to appear in each separate piece of sales literature that the defendants may use and the representations shall appear in the forepart of the literature.

In addition, the persons preliminarily enjoined shall refrain from making:

A. Any representations as to the following unless clearly qualified as being speculative and as conditioned by other representations herein required, or any false representations whatsoever as to:

1. The profits that a purchaser might

obtain if he bought beaver;

2. The future price of beaver for breeding or other purposes;

3. The prices the beaver pelts will bring in the future;

4. A difference in quality between the price of pelts taken from wild beaver and the pelts taken from domesticated beaver;

5. Any difference in market prices for pelts taken from wild beaver and pelts taken from domesticated beaver, or

6. The profits made by other owners of beaver, or

7. Any other future event or happening; or

B. Any untrue statements of any past or present material fact, the truth of which is known to them or which, by the exercise of reasonable care, could be ascertained by them concerning but not limited to the following:

1. That Mark Weaver was the first man in the world to learn the secret of the beaver, the mating process, the pen design and other factors necessary to induce the

beaver to reproduce successfully in captivity, and that Mark Weaver alone has been successful in the raising of beaver;

2. The defendants were the only ones who could determine the sex of a beaver;

3. The beaver will be sold in the order in which they are listed for sale with one or more of the defendants;

4. The number of persons who have made money from an investment in beaver;

5. The number of domestic pen raised beaver in the domestic herd;

6. The number of trapped wild beaver introduced into the herd;

7. The origin, record and history of the beaver being sold and used as replacements or under guarantees of production;

8. The number of colors of beaver that have been developed and the number of beaver of each color in the herd.

Nothing contained in this preliminary injunction shall be deemed to prohibit the continued collection of ranching fees from the owners of beaver, if such owners voluntarily see fit to continue to make such payments.

Dated at Salt Lake City, Utah, this 12 day of Oct. A.D. 1966.

BY THE COURT:

/s/ A. Sherman Christensen
A. Sherman Christensen
United States District Judge

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

November Term, 1967

FILED
United States Court of Appeals
Tenth Circuit
DEC 26 1967
William L. Whittaker
Clerk

CONTINENTAL MARKETING CORPORATION,	)	
Appellant,	)	
v.	)	No. 9199
SECURITIES AND EXCHANGE COMMISSION,	)	
Appellee.	)	

Appeal from the United States District Court for the District of Utah

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Lewis B. Kean and Earl Hightower (H. Byron Mock was with them on the brief) for Appellant.

Richard M. Phillips, General Counsel, (David

Ferber, Solicitor, and Janet G. Feldman, Attorney, Securities and Exchange Commission, Washington, D.C., and Robert H. Davenport, Attorney, Securities and Exchange Commission, Denver, Colorado, were with him on the brief) for Appellee.

Before MURRAH, Chief Judge, and PHILLIPS and LEWIS, Circuit Judges.

LEWIS, Circuit Judge.

Continental Marketing Corporation appeals from an order entered by the District Court for the District of Utah preliminarily enjoining the company from offering for sale and selling investment contracts for the "sale, care, management, replacement or resale of live beaver for breeding purposes," in violation of the anti-fraud provisions contained in Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q(a), and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. 240.10b-5. Continental is the sole appellant although the injunction was entered against seven business organizations and three named individuals found by the court to be acting in concert in the promotion and sale of unregistered securities. Noncompliance with the registration provisions of the Act is admitted and matters pertaining to fraudulent representations and use of the mails to effectuate sales are not in issue. The form of the injunction is not attacked. Continental's appeal questions only the finding that the company was engaged in the offer and sale of securities within the

meaning of applicable federal laws.

Continental asserts that it is engaged exclusively in the brokerage of live beavers, organized for such purpose independently from all other defendants and in direct competition with some; that its contracts and services begin and end with the sale and delivery of live, specific and identified animals and that purchasers' reliance on the company extends no further. The company's formal contractual documents are in accord with this contention. Consequently, if the test of compliance with the compulsion of the Securities Act goes no further than an examination of organization and formal activity the subject injunction has been improvidently entered. Manifestly, the simple sale and delivery of live beavers do not, when viewed in isolation, constitute the sale of a security under the Act.

Appellant, however, does and must recognize that its vulnerability to the injunction allows judicial consideration of the overall concept of its contracts from inducement to formal consummation and beyond. "The test rather is what character the instrument is given in commerce by the terms of the offer, the plan of distribution and the economic inducements held out to the prospect. In an enforcement of an act such as this (Securities Act) it is not inappropriate that promoters' offerings be judged as what they were represented to be." S. E. C. v. Joiner Corp., 320 U. S. 344 at 352-53.

Appellant was organized in 1965 as a

Colorado corporation and thereafter represented itself as an integral part of the organized domestic beaver industry. Its sales literature, couched in such glowing terms as "fabulous possibilities" and the "road to riches," presented to the prospective purchaser a history of the development of the beaver industry with specific reference to the activities, both past and present, of co-defendants and illustrated for the benefit of the purchaser a charted explanation of what was available in service after purchase of the beaver from appellant. The chart lines a sale of beaver from appellant (or either of two other defendant sales companies) to the owner purchaser. Thereafter the owner may care for his own animals with each pair of beaver requiring a private swimming pool, patio, den and nesting box together with the services of a veterinarian, dental technician, breeding specialist, etc. or the owner may choose to place his animals (at a cost of $6 per month per animal) with a professional rancher who is a member of the defendant North American Beaver Association which in turn has available the technical assistance of two ranchers' service companies, also named defendants. All purchasers of beaver were encouraged not to take possession of the animals and although Continental made over two hundred sales in sixteen states, grossing over a million dollars, all who purchased from appellant elected not to take possession of their beavers and each contracted with one of the ranchers as suggested by appellant.

The history of the domestic beaver industry

as represented to prospects by Continental and as revealed by the evidence taken at trial need only be briefly summarized. Prior to 1950, Mark Weaver, one of the defendants below, had successfully developed a small herd of domestic beavers and purportedly was "the first in the world to learn the secrets of the beaver" by discovering "the feed formula, the mating process, the pen design, [and] the other factors necessary to induce the beaver to reproduce in captivity." In an attempt to broaden the industry sufficient to establish a market for domestic beaver fur, a program was developed whereby members of the public were invited to invest in beavers. The investor could take up beaver ranching or ranch his beavers with Weaver or someone whom Weaver had induced to take up ranching. In any event the ranching was done under Weaver's expert supervision and Weaver provided many services incident to the domestic raising of beavers.

From an organization standpoint, the business was originally conducted through a sole proprietorship, next a partnership, and then through two corporations, one of which was, generally speaking, responsible for the selling activities and the other for providing the various services. Originally investors signed a single contract which contained the purchase terms, terms for care and breeding and a guarantee that there would be a 100 percent increase of the beavers during the first year. After entry of a "cease and refrain order" with respect to the sale of investment contracts entered in November 1963, by the California Securities

Commission, the purchasers of beavers entered into separate contracts for purchasing and ranching.

In 1965 three new companies, including appellant, were organized to take over the sales activities. This change came in the wake of an informal investigation by the Commission's staff and was apparently intended to accomplish compliance with regulations. The new companies involve principally the same people who were involved in the earlier organization. Chairman of the board and one of the three stockholders of appellant was a salesman in one of the earlier corporations and was one of the parties against whom the California "cease and refrain order" was issued.

In addition to the more commonly known securities, Section 2(1) of the 1933 Act, 15 U. S. C. 77(b)(1), defines a security to include

> ". . . any certificates of interest or participation in any profit-sharing agreement . . . investment contract, . . . or, in general, any interest or instrument commonly known as a 'security,' . . . ." (emphasis added).

The 1934 Act contains a similar definition in Section 3(a)(10), 15 U. S. C. 78c(a)(10). The district court concluded that Continental was engaged in a common enterprise, the very heart of which was a chance to invest money through multiple contracts amounting in reality to an "investment contract" within the meaning of the

applicable statute. The subject injunction is so founded and we hold it to be legally sound. In S. E. C. v. W. J. Howey Co., 328 U.S. 293, the Supreme Court gave approval to the state courts' practice of broadly construing the term "investment contracts" as a means of affording "the investing public a full measure of protection," and held that Congress in using the term in the 1933 Act had adopted such meaning "which had been crystallized by this prior judicial interpretation." (at 298). The Court went on to define an investment contract as

> "a contract transaction or scheme whereby a person invests his money in a common enterprice and is led to expect profits solely from the efforts of the promoter or a third party. . . ." (at 298-99).

The appellant points out that in Howey both the sales contract of a unit of a citrus grove and the contract for the care and management of the same were executed by the same promoter. We are urged, therefore, to hold that

> "The judicial definition of the term 'investment contract' requires the investment in a common enterprise in which the investor is led to expect profits solely from the efforts of the seller or a third person owned or controlled by the seller." (emphasis added).

We do not think the element of ownership or

control is essential. The better approach and the one which the Supreme Court in Howey noted was being employed by the state courts is to disregard form for substance and place emphasis on economic reality. The more critical factor is the nature of the investor's participation in the enterprise. If it is one of providing capital with the hopes of a favorable return then it begins to take on the appearance of an investment contract notwithstanding the fact that there may be more than one party or other than a principal party and his agent on the other end of the transaction or transactions. This accords with the views expressed by the Fifth Circuit in a case involving the sale of oil leases where a test well was to be drilled by a third party. The court said:

> "The promoters were selling a chance to make a great deal of money from activities which were then, or would shortly be, carried on by persons other than the purchasers. In that setting it mattered not whether the test wells were to be drilled by sellers, or by third persons either under, or independent of their control." Roe v. United States, 287 F_2 435, 439.

See also S. E. C. v. Orange Grove Tracts, D. Mass., 210 F. Supp. 81, citing the Fifth Circuit Roe case.

The expressed and cited interpretation of the Securities Act amply covers the activities of appellant in the case at bar. Cotinental's

appearance to the public, by design, was that of a representative of the domestic beaver industry, the growth and development of which was necessary to and would bring profit to investors. Purchasers were encouraged to leave their beavers at the ranches where they were located at the time of sale and where they would be "expertly housed, fed and otherwise cared for." They were advised that all they needed to do was buy the beavers, pay ranching fees and reap "geometric profits" as the beavers reproduced and the offspring sold. It was to be a "once in a lifetime opportunity" and "an opportunity to share in the profits of the breeding stock stage . . . the most lucrative stage in the development of the beaver industry." 1/

Investment by members of the public was a profit-making venture in a common enterprise, the success of which was inescapably tied to the efforts of the ranchers and the other defendants and not to the efforts of the investors. "[T]he royal road to riches," of which appellant spoke, could be traveled, if at all, only through the

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1/ Evidence in the district court showed that defendants had sold beaver to investors for breeding purposes at prices that ranged between $2,000 and $6,000 and that defendants, including appellant, had represented that there was a market for live beavers at this price when, in actuality, live beavers could be purchased for as little as $20 and that no general market for live beavers in excess of $100 existed.

structure which had developed from the embryonic state of the Weaver organization of the early 1950's. This structure into which investors entered was designed to obtain sufficient resources to produce enough domestic beavers to establish a market for its fur. If the structure collapsed then the purchasers would have little more than a bad investment. Certainly the beavers as mere animals and not as part of the enterprise did not have value consistent with the price many of the purchasers paid. 2/ The economic inducement was the faith or hope in the success of the enterprise--the domestic beaver industry--as a whole, and not the value of the animals alone.

In this setting we hold that the transactions in question involved the sale of investment contracts and therefore "securities" within the meaning of the applicable acts and apply, with approval of the High Court, "a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes designed by those who seek the use of others on the promise of profits." Howey, supra, at 299.

AFFIRMED.

2/ See footnote No. 1, supra.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1258

CONTINENTAL MARKETING CORPORATION, PETITIONER

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 36–45) is reported at 387 F. 2d 466. The findings of fact and conclusions of law of the district court (Pet. App. 10–23) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1967. The petition for a writ of certiorari was filed on March 25, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the sale, by an organization seeking to raise capital to establish a domestic beaver industry, of pairs of live beavers that were to be housed, cared for and bred for the purchasers at a profit, constituted the public sale of investment contracts under the federal securities laws.

STATUTES INVOLVED

Section 2(1) of the Securities Act of 1933, as amended, 15 U.S.C. 77b(1), defines "security" to include

> * * * any * * * certificates of interest or participation in any profit-sharing agreement * * * investment contract, * * * or, in general, any interest or instrument commonly known as a "security", * * *.

Section 3(a)(10) of the Securities Exchange Act of 1934, 15 U.S.C. 78c(a)(10), includes the same language in its definition of "security."

STATEMENT

Petitioner has been selling to the public pairs of beavers, which were to be housed, cared for, and bred at a profit. Petitioner was organized in 1965 to carry out one part of what its literature denominated a "program" to establish a "domestic beaver industry." The overall program had been created some years earlier by Mark Weaver (R 497 DF 2, 507, 520 WB 1).[1] Petitioner's role was to sell to members of the

[1] "R" refers to pages of the record. "R" 497 DF" refers to pages of Petitioner's brochure entitled "The Diamond of Furs" and "R 520 WB" refers to pages of a brochure entitled "Weavers' Beavers" and bearing a picture of a woman identified as

public live beavers as an investment; other participants in the program performed the various activities represented by petitioner to be necessary both to make the ownership of beavers profitable and to achieve the program's goal—a herd of domestic, pen-born beavers in sufficient numbers to provide the fur markets with a constant supply of domestic beaver pelts (R 491). Basically, these activities ("the management activities") involved "ranching," providing medical care for and breeding the beavers.

In its sales literature petitioner identified itself as "a representative" of the domestic beaver industry and announced that "a program has been organized which makes possible large profits for the individual beaver owner and at the same time gives the industry the money it needs to grow and develop" (R 497 DF 1, 2; 489–490). The program's premise was that "[t]he history of ranching fur-bearing animals shows that domestication brings about a marked increase in the price of pelts" (R 497 DF 7–8) and that domestication of beavers would generate the "[f]ortunes [that] have been made in the domestication of mink" (R 497 DF 9). Because the industry had not yet reached "the pelting stage," petitioner offered members of the public "an opportunity to share in the profits of the breeding stock stage" (R 489–490), "the most lucrative stage in the development of the beaver industry" (R

Edith Weaver on its cover page. The brochures are not numbered as separate pages of the record but are incorporated into the record in envelopes. Each envelope bears a single page number and contains unnumbered documents other than the brochures cited herein.

497 DF 13), by selling them pairs of live beavers which would be used as breeders. The district court noted that petitioner charged prices ranging between $1,000 and $3,000 per beaver (Pet. App. 17), even though "[t]here is no market for live beaver at prices in excess of $100 per beaver (live beaver can be purchased for as little as $20 each), except the market created and maintained by the defendants * * *" (Pet. App. 29, 18).[2]

While investors could elect to take possession of the beavers, petitioner's salesmen, reaffirming the sales literature's opening maxim—"[o]ne good investment is worth a lifetime of toil" (R 497 DF 1)—informed investors that all they had to do was buy the beavers, leave them on existing ranches, and pay ranching fees (R 888–c, 924–925); the beavers would reproduce and the offspring could be sold by petitioner and the owners would reap "geometric profits" (R 491, 493, 522). In fact, no member of the public who bought beavers from petitioner ever took possession of his beavers; each availed himself of the management activities recommended by petitioner and performed by the other participants in the program (R 698).

[2] The district court found that from 1932 to the time of trial, "the highest average price at which a lot of beaver pelts had sold was $70 per pelt and generally $20 to $40 per pelt, and as low as $6.15 per pelt, notwithstanding the defendants have been representing that ranching fees are $72 per year for each beaver and that it takes more than a year for a beaver to reach maturity and that the purchaser will profit from investing in beaver at prices of $2,000 to $6,000 per pair" (Pet. App. 18).

The beavers offered to the public were represented to be the domestic, pen-born offspring of 60 pairs of beavers belonging to Mark Weaver (R 888–A), which had been scientifically raised and bred in special facilities located on ranches operated by other participants in the program (R 497 DF 1, 3; 489–491). Petitioner's sales literature encouraged purchasers to leave their beavers on the "approved" ranches, where they were located at the time of the sale and where they would continue to be "expertly housed, fed, and otherwise cared for" (R 491) "by a team of specialists" (R 497 DF 3),[3] and identified by name and location the ranches where beavers purchased by investors could receive such professional care (R 497 DF 3, back outside cover). Upon making a sale, petitioner notified the operator of the ranch on which the beavers were located, thereby enabling the rancher to mail service contracts to the new owner for his signature (R 926).

Prior to 1965 all the selling and most of the management activities of the program had been carried on by the North American Beaver Association ("NABA"), which Mark Weaver had formed (R

[3] Purchasers of beavers were advised that special facilities, which cost $20,000 to build, were needed to house beavers. These special facilities included a private swimming pool, patio, den and nesting box for each pair of beavers (R 75, 459–491; 497 DF 3; 552, 923). They were also advised that beavers require specialized care, a constant flow of large quantities of fresh water, special food which had to be varied with climatic conditions and expert veterinary, dental, tatooing and breeding services, and that only seven people in the United States could determine the sex of a beaver (R 888–B, 922–926).

3063, 3462).[4] In 1965, after the Commission's staff had begun an informal investigation, the operation of the program was changed because "it appeared that the divorcement of sales activity from beaver care was necessary to avoid possible violation of SEC regulations and to insure unhampered growth of the beaver industry" (R 507). Petitioner, formed by persons who had been salesmen of NABA (R 1809–1811, 2784–2787), was one of three "selling organizations" which then emerged (R 1823–1824, 2102–2104).[5]

In 1966 the Commission brought suit against all the participants in the program, seeking to enjoin them from further violations of the registration and antifraud provisions of the securities laws.[6] After a

[4] The ranching of the beavers was carried on by NABA members. Other management activities, principally record-keeping and "expert supervision" of the ranchers, were performed by another entity formed by Weaver, American-Canadian Beaver Company, Inc. (R 3063).

[5] At about the same time, the ranching activities were divided between two entities and the "expert services" were divided between two other entities. Petitioner also offered and sold to purchasers of beavers warranties of NABA for the replacement of the beavers in the event of death or nonproduction (R 497 DF 4; 935). The warranties, which previously had been offered by NABA salesmen (R 728, 733–734, 796–797, 839, 1731), were represented by petitioner as giving "an assurance of at least two additional beaver for each pair purchased" (R 497 DF 4). The purchaser of the NABA warranty would pay petitioner for the warranty and petitioner would then transmit the money to NABA (R 1876–1878). The warranty was effective only if the animals were "husbandried" according to the accepted practice and standards of the "Domestic Beaver Industry" (R 935).

[6] Sections 5 and 17(a) of the Securities Act of 1933, 15 U.S.C. 77e and 77q(a); and Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5 thereunder, 17 CFR 240.10b-5.

hearing, the district court determined that the defendants were offering and selling investment contracts involving the "sale, care, management, replacement, feeding and resale of live beaver for investment" (Pet. App. 11) and had made misleading statements in connection therewith (Pet. App. 16). It preliminarily enjoined them from further offers and sales of the securities in violation of the antifraud provisions[1] of the securities laws (Pet. App. 24–35).

In the court of appeals, petitioner challenged the district court's holding that it was offering and selling investment contracts but did not contest the district court's findings of fraud. The court of appeals, relying on *Securities and Exchange Commission* v. *Howey Co.*, 328 U.S. 293, and *Securities and Exchange Commission* v. *Joiner Corp.*, 320 U.S. 344, sustained the district court, stating: "We do not think the element of ownership or control [between the seller and manager of the property which is the subject of an investment contract] is essential * * *. The more critical factor is the nature of the investor's participation in the enterprise" (Pet. App. 42–43). Focusing upon the nature of that participation, it ruled: "Investment by members of the public was a profit-making venture in a common enterprise, the success of which was inescap-

[1] The district court also held that the defendants' activities violated the registration provisions of the Securities Act of 1933. Upon a balancing of the equities, it concluded that, at the preliminary stage of the proceeding, the protection of investors and the public interest did not also require an injunction to obey the registration requirements (Pet. App. 21).

ably tied to the efforts of the ranchers and the other defendants and not to the efforts of the investors" (Pet. App. 44).

ARGUMENT

The decision of the court below is correct and in accord with principles settled by prior decisions of this Court and other courts of appeals. The petition presents no question warranting further review.

It has long been held that animals may be the subject of investment contracts within the meaning of laws regulating securities transactions. See, *e.g., Securities and Exchange Commission* v. *Payne,* 35 F. Supp. 873 (S.D.N.Y.) (silver foxes), and *Stevens* v. *Liberty Packing Corp.,* 111 N.J. Eq. 61, 161 A. 193 (rabbits), both cited with approval by this Court in *Joiner, supra,* 320 U.S. at 352–353, footnote 10. See, also, *Hollywood State Bank* v. *Wilde,* 70 Cal. App. 2d 103, 160 P. 2d 846 (Dist. Ct. App.) (chinchilla).

Petitioner apparently does not contest this proposition, but it argues that the applicability of the federal securities laws to investment contracts does not include the situation where those who seek to obtain the "use of the money of others on the promise of profits" (*Howey, supra,* 328 U.S. at 299) have arranged to divide their labors. This contention would make the protections of the federal securities laws depend upon a meaningless distinction, as this case amply demonstrates.

The economic position of the members of the public, who were induced to purchase beavers as an invest-

ment before, during and after the 1965 reorganization from which petitioner emerged as a separate sales corporation, remained unaltered. The role of members of the public at all times was that of furnishing the capital for the enterprise—providing "the industry the money it needs to grow and develop" (see page 3, *supra*). Their position in the enterprise, like that of purchasers of other securities in the form of investment contracts, was continuously characterized by "a complete separation of ownership and management, * * * in which the owner takes no part, other than investing * * *"; [8] where the promised profits would come, if ever, "solely from the efforts of others" (*Howey, supra,* 328 U.S. at 301; *Tcherepnin* v. *Knight,* 389 U.S. 332, 338).

Moreover, from the standpoint of investors—the persons to be protected by the federal securities laws—it is immaterial whether petitioner or others recommended by petitioner would actually perform the management activities. "The test is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey, supra,* 328 U.S. at 301; *Tcherepnin, supra,* 389 U.S. at 338. As were the defendants in *Howey, supra* (328 U.S. at 301), petitioner was offering "the essential ingredients of an investment con-

[8] *Securities and Exchange Commission* v. *Earl,* 41 F. Supp. 647, 650 (S.D. Fla.), companion case to *Securities and Exchange Commission* v. *Bailey,* 41 F. Supp. 647 (S.D. Fla.), cited with approval in *Securities and Exchange Commission* v. *Howey Co.,* 328 U.S. at 299 (footnote 5), and *Securities and Exchange Commission* v. *Joiner Corp.,* 320 U.S. at 352 (footnote 10).

tract." That the sales and management are provided by different entities is immaterial. *Roe* v. *United States*, 287 F. 2d 435, 439 (C.A. 5), certiorari denied, 368 U.S. 824; *Securities and Exchange Commission* v. *Orange Grove Tracts*, 210 F. Supp. 81, 83 (D. Mass.). The fact that the prices petitioner was charging were "incongruous" in relation to the prices at which live beavers or beaver pelts were otherwise available (Pet. App. 19, see pp. 3–4 *supra*) graphically verifies the otherwise amply documented conclusion of the courts below that petitioner was not merely selling live beavers but was soliciting participation by the public in an investment scheme.

In short, this case involves merely one more of "the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits," which have been covered over the years by the *Howey* test (328 U.S. at 299).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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